IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1229

GARY GEORGE HUFFMAN, Individually, As Administrator of the Estate of Jane Todd Huffman, Deceased, and As Next Friend of Shannon Michele Huffman, An Infant ..... APPELLANT

VS:

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS and DEPARTMENT OF NATURAL RESOURCES ..... APPELLEES

ON APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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VS:

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

_____

JURISDICTIONAL STATEMENT

_____

OPINIONS BELOW

The unreported opinion of the Court of Appeals of Kentucky from which this appeal is taken is reprinted as Appendix C, hereto. The Mandate rendered by the Court of Appeals of Kentucky,

affirming the decision of the Trial Court, is reprinted as Appendix E, hereto.

The Order of the Trial Court, the Franklin Circuit Court in Franklin County, Kentucky, rendered the 6th day of October, 1976, dismissing Appellants' Complaint, is reprinted as Appendix B, hereto.

The Order Denying Discretionary Review rendered on the 7th day of December, 1977, by the Supreme Court of Kentucky is reprinted as Appendix D, hereto.

JURISDICTION

(i)

This proceeding is an appeal brought by Appellant, Gary George Huffman, seeking to recover for the damages sustained by his daughter, Shannon Michele, by the Estate of his deceased wife, and by himself, individually, as a result of a head-on automobile collision which caused the death of Appellant's wife and severe and permanent injuries to Appellant's daughter.

The automobile collision occurred when a car driven by a state employee crossed the dividing median on Versailles Road in Fayette County, Kentucky, and collided with the car driven by Appellant's wife. Appellant asserted in his

Complaint filed in Franklin Circuit Court that the collision was caused by the negligent and inattentive driving of the state employee, who was acting within the scope of his employment at the time of the collision and by the negligent and improper design, construction and/or maintenance of the Versailles Road, a state maintained highway.

Appellant's Complaint was dismissed by Order of the Franklin Circuit Court dated October 6, 1976 (Appendix B). Upon appeal to the Court of Appeals of Kentucky, that Court affirmed the decision of the Trial Court by an opinion rendered August 5, 1977 and held that it was bound by §231 of the Kentucky Constitution which grants immunity to the Commonwealth of Kentucky (Appendix C).

Appellant moved in the Supreme Court of Kentucky for discretionary review of the decision of the Court of Appeals of Kentucky. That Motion was denied by Order of the Supreme Court of Kentucky entered December 7, 1977 (Appendix D).

The Appellant contends that §231 of the Kentucky Constitution violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution since, under the decisions of the Kentucky Courts interpreting §231, a person injured through the negligence of an employee or agent of the Commonwealth of Kentucky is totally denied the

rights afforded to a person injured through the negligence of any other tortfeasor. Such a victim is denied access to the courts, the right to a jury trial, the right to recover for pain and suffering and the right to recover to the full extent of the damages suffered. Thus, the victim is denied equal protection of the laws and suffers a loss of his property without due process of law.

(ii)

The date of the judgment or decree sought to be reviewed and the time of its entry is December 9, 1977, the date on which the Mandate of the Court of Appeals of Kentucky was issued wherein the judgment of the Trial Court was affirmed.

The Notice of Appeal to the United States Supreme Court was filed on February 17, 1978, in the Franklin Circuit Court.

(iii)

The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. §1257(2), which permits this Court to review, by appeal, the judgment of the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

It has previously been held by this Court that a state constitutional provision is a state statute for purposes of appeal under 28 U.S.C. §1257(2). *Railway Express Agency, Inc.* v. *Virginia*, 282 U.S. 440 (1931).

(iv)

The cases believed to sustain jurisdiction are *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *James* v. *Strange*, 407 U.S. 128 (1972); *Mathews* v. *Lucas*, 427 U.S. 495 (1976); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974); *Reed* v. *Reed*, 404 U.S. 71 (1971); *San Antonio Independent School Dist.* v. *Rodriquez*, 411 U.S. 1 (1973); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *Trimble* v. *Gordon*, 430 U.S. 762 (1977).

(v)

The constitutional provision being challenged as to its validity is §231 of the Kentucky Constitution. It is found in Volume 1, page 514 of the official Bobbs-Merrill edition of the Kentucky statutes and states in its entirety as follows:

> §231. Suits Against the Commonwealth. The General Assembly may, by law, direct in what manner and in what courts suit may be brought against the Commonwealth.

QUESTION PRESENTED

Does §231 of the Kentucky Constitution, which has been interpreted by the Kentucky Courts as granting sovereign immunity to the Commonwealth of Kentucky, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On September 5, 1975 suit was filed in Franklin Circuit Court against the Commonwealth of Kentucky, Department of Highways and Department of Natural Resources for injuries suffered by Appellant, Gary George Huffman, individually, and in his capacity as Administrator of the Estate of his wife, Jane Todd Huffman, and as Next Friend of his infant daughter, Shannon Michele Huffman. In his Complaint, appended hereto as Appendix A, Appellant alleged that on September 9, 1974, his wife, Jane Todd Huffman, was driving toward Lexington on Versailles Road in Fayette County, with her daughter, Shannon Michele Huffman, as a passenger. A car driven by Charles Stephen Jones crossed the dividing median of Versailles Road in Fayette County, Kentucky, and collided head-on with the Huffman vehicle. As a result of the collision Mrs. Huffman was killed and Shannon Michele was severely and permanently injured causing her to undergo months of hospitalization

and numerous operations and to incur medical bills of at least $30,000.00.

The Complaint further alleged that Mr. Jones, on the date the accident occurred, was employed by the Kentucky Department of Natural Resources and was acting within the scope of his employment at the time of the accident and that the accident was caused by the negligent and inattentive driving of Charles Stephen Jones and by the negligent and improper design, construction and/or maintenance of the Versailles Road.

In response to Appellees' plea of sovereign immunity and motion for dismissal, Appellant argued *inter alia*[1] that the doctrine of sovereign immunity in Kentucky violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The Trial Court in its Order dismissing Appellant's Complaint, appended hereto as Appendix B, dealt with the federal constitutional issues raised by Appellant as follows:

> We are asked to strike down the doctrine of sovereign immunity as well as the Board of Claims Act as being archaic and indefensible violations of the Kentucky Constitution, esp. [sic] the Bill of Rights, and the Fourteenth

1. The other issues raised were "state" questions not pertinent to this appeal.

Amendment to the Constitution of the United States. These questions have been approached and fully answered in *University of Kentucky* vs. *Guinn* [sic], Ky., 372 S.W.2d 414 (1963) and in *Smith* vs. *Commonwealth, Department of Highways,* Ky., 495 S.W.2d 179 (1973) wherein it was said:

> "Conceding that the doctrine of sovereign immunity is not above reproach, in view of *Foley Construction Company* vs. *Ward,* Ky., 375 S.W.2d 392 (1964), it would appear that the appropriate forum for pursuing the fight against it is the General Assembly."

This Court has neither the authority nor the temerity to overrule a decision of the supreme Court of the Commonwealth.

No assignment of error is necessary to raise an appealable issue in the appellate courts in Kentucky.[2] The federal question sought to be reviewed here was again raised in the Court of Appeals of Kentucky, as is the procedure in Kentucky, in Appellant's Brief to the Court of Appeals of Kentucky.

The Court of Appeals of Kentucky by opinion appended hereto as Appendix C, reluctantly upheld the doctrine of sovereign immunity in Kentucky stating in its opinion that "it is clearly now a

2. Kentucky Rules of Civil Procedure, Rule 75.04.

shabby robe when worn by a modern constitutional state." (Appendix C, p. 16a) The Court of Appeals of Kentucky felt itself bound by §231 of the Kentucky Constitution which the highest court in Kentucky (now the Supreme Court of Kentucky) has interpreted as granting sovereign immunity to the Commonwealth of Kentucky. The Court of Appeals of Kentucky dismissed Appellant's assertion that §231 violates the United States Constitution without stating the reasons therefor as can be seen from the Court's discussion of the issue in its opinion at pages 17a-18a, *infra:*

> Appellant contends that sovereign immunity is violative of the equal protection and due process clauses of the fourteenth amendment of the United States Constitution. Other jurisdictions which have recently faced this contention have divided, due in part to different factual situations. See. e.g., *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P.2d 66 (1974) (held violative); *Brown* v. *Commonwealth,* 305 A.2d 868 (Pa. 1973) (held not violative). Though the reasoning in *Brown* v. *Wichita State University, supra,* and the dissents in *Brown* v. *Commonwealth, supra,* are highly persuasive, we are not bound by them. We uphold sovereign immunity as not violative of equal protection and due process.

Appellant next sought discretionary review by the Supreme Court of Kentucky with the federal

questions sought to be reviewed here being presented as one of the questions of law. The Supreme Court of Kentucky by Order appended hereto as Appendix D, denied Appellant's Motion for discretionary review with no reasons being given for such denial.

Since a provision of the Kentucky Constitution has been drawn into question as being repugnant to the Constitution of the United States and the highest Court of Kentucky has decided in favor of validity, jurisdiction by appeal is conferred on this Court by 28 U.S.C. §1257(2).

SUBSTANTIAL FEDERAL QUESTION

Through this appeal Appellant objects to the denial of equal protection and due process to himself and to all persons who become victims of the negligence of employees or agents of the Commonwealth of Kentucky. This classification, alone, would include numerous persons each year and hence a substantial number of persons are forced to suffer this denial of equal protection and due process. Moreover, a similar situation exists in numerous other states and thus a substantial number of persons in each of those states are also forced to suffer the denial of equal protection and due process of which Appellant complains. For these reasons and for the reasons set forth below

explaining the way in which Appellant is denied his right to equal protection and due process, this appeal involves federal questions which are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

I. THE DOCTRINE OF SOVEREIGN IMMUNITY IN KENTUCKY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The constitutionally prohibited denial of equal protection of the laws of which this Appellant complains is simply that the interpretation by the Kentucky courts of §231 of the Kentucky Constitution as granting sovereign immunity to the Commonwealth of Kentucky discriminates *within* the class of persons negligently injured in the Commonwealth of Kentucky. The doctrine of sovereign immunity as it now exists in the Commonwealth of Kentucky creates two classes of individuals who have suffered injury to their person or property.

The first class is that group of individuals injured through the negligence of an agent or employee of the Commonwealth of Kentucky. Such individuals cannot bring suit against the Commonwealth of Kentucky in a court of general jurisdiction and seek recovery for all damages

suffered as a result of such negligence. Instead, such individuals are required to bring suit under the Kentucky Board of Claims Act (KRS 44.070-.160) where they will be denied the right to a jury trial and will be required to present their case to a Board established by the state rather than an impartial trial judge. Moreover, such individuals are denied the right to recover for pain and suffering and are limited in their recovery to an amount set by the Kentucky Legislature with such amount currently being only $20,000.00, regardless of whether this amount will pay even the medical bills.

The second class consists of those individuals injured through the negligence of any person or entity or agent of any person or entity other than the Commonwealth of Kentucky including those persons injured through the negligence of an agent of a municipal government in the Commonwealth of Kentucky. These individuals enjoy all the rights normally afforded an injured party and all the rights guaranteed by the United States and Kentucky Constitutions. Such individuals have the right to bring suit in the appropriate trial court, they will be afforded a jury trial, if desired, and they are entitled to recover, without limitation, all damages they are able to prove they have suffered, including pain and suffering.

Under the foregoing classifications, persons injured in the Commonwealth of Kentucky are

classified solely by the status of the tortfeasor involved. Their right to redress and the remedies available to them is dependent solely upon whether the tortfeasor is an agent or employee of the Commonwealth of Kentucky. No regard is given to the injury inflicted or the facts and circumstances surrounding the events which caused the injury. Such a classification clearly impinges on a fundamental right and should, therefore, be subjected to close judicial scrutiny and found violative of equal protection. In the alternative, even if it is determined that a fundamental right is not involved, Appellant asserts that the classification resulting from the application of sovereign immunity in Kentucky is not reasonable, it is arbitrary, it does not rest upon a ground of difference having a fair and substantial relation to the object of the law and it, therefore, violates equal protection. In either event, the doctrine of sovereign immunity in Kentucky violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and, even though established by the Kentucky Constitution, the doctrine should be abolished under the supremacy clause of Article VI of the United States Constitution.

A. THE CLASSIFICATION RESULTING FROM THE APPLICATION OF THE DOCTRINE OF SOVEREIGN IMMUNITY IS NOT NECCESSARY TO FURTHER COMPELLING STATE INTERESTS.

The doctrine of sovereign immunity in Kentucky creates a class of people who, if injured due to the negligence of an agent of the Commonwealth, are prohibited from bringing suit in Circuit Court against the Commonwealth to recover for all the injuries suffered. This prohibition from suit impinges on the fundamental right granted to all people by the Fourteenth Amendment to the United States Constitution that a person shall not be deprived of life, liberty or property without due process of law. When a person is damaged in his property or his person by one acting within the scope of his employment by the state and that person is prevented from bringing suit against the employer of the tortfeasor then, in the usual situation where little or nothing can be collected from the tortfeasor, the injured party must bear the loss suffered and be deprived of his property and sometimes his life without due process of law.

Appellant contends that this is a clear denial of a fundamental right and the restriction should, therefore, be subjected to the most rigid scrutiny. This Court has held that a restriction of fundamental rights guaranteed either explicitly or implicitly by the United States Constitution

demands strict scrutiny to determine whether the classification is necessary to further compelling state interests. *San Antonio Independent School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973). Clearly, the right of a person not to be deprived of his life, liberty or property without due process of law is a right *explicitly* guaranteed by the Fourteenth Amendment to the United States Constitution and one that compels the Court to closely scrutinize any infringement of the right.

The reason often advanced for denying to injured people the right to bring suit against the state is to protect the fiscal integrity of the state. This Court has repeatedly stated that although fiscal integrity is a valid state interest, the state must show something more than mere economy to withstand strict scrutiny. *Memorial Hosp.* v. *Maricopa County,* 415 U.S. 250 (1974); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). *Maricopa* involved an Arizona statute which required a year's residence in a county as a condition to receiving non-emergency hospitalization or medical care at the county's expense and *Shapiro* involved a statute denying welfare assistance to residents of a state who had not resided within the state for at least one year immediately preceding their application for such assistance.

In both instances it was argued that the statutes were necessary to discourage an influx of

indigents wishing to take advantage of welfare benefits or free medical services. In each case the classifications were subject to strict scrutiny and this Court found that protecting the fiscal integrity of the state was not a compelling state interest to allow an impairment of a constitutionally protected interest. *Maricopa, supra* at 263; *Shapiro, supra* at 633. It should be noted that the constitutional right involved in these cases — the right to interstate travel — is a right *implied* in the United States Constitution and not one *explicitly* stated.

In view of these previous decisions by this Court, it is clear that sovereign immunity cannot be allowed to stand in Kentucky since any interest of the Commonwealth of Kentucky in protecting its fiscal integrity is far outweighed by the need to protect the rights granted to the people by the Fourteenth Amendment to the United States Constitution. Moreover, it is apparent from the decision of the Court of Appeals of Kentucky rendered in this case that that Court believes the fiscal integrity of the state is no longer a valid argument in favor of sovereign immunity. That Court in its opinion stated as follows at page 16a *infra:*

> On appeal to this court, the appellant contends that sovereign immunity is a judicially created doctrine which has outlived its

usefulness and now should be abolished. If we were starting with a *tabula rasa,* this would be a tempting choice. Regardless of the validity this doctrine once had, it is clearly now a shabby robe when worn by a modern constitutional state. Even the time-worn and honored argument that sovereign immunity is necessary to protect public funds which have been appropriated for specific purposes, see J. Dietzman in *Taylor* v. *Westerfield,* 233 Ky. 619, 26 S.W.2d 557, 69 *A.L.R.* 483 (1930), no longer has validity in an era when governments tax and spend vast amounts greatly in excess of anything our forefathers could have imagined. Not only has the financial capacity of government increased, but its ability to cause damage has multiplied, as is evidenced by the allegations in this case.

That these statements are perfectly correct can be seen by the fact that the Kentucky Court of Appeals in 1964 abolished the immunity of municipalities in Kentucky, *Haney* v. *City of Lexington,* Ky., 386 S.W.2d 738 (1964), and there is to date no indication that the cities have suffered unduly from the action.

Furthermore, the evidence indicates that if sovereign immunity were abolished the fiscal integrity of the Commonwealth would not even be in danger. The Federal Government, as early as 1946, waived its immunity from liability in most tort cases and provided for litigation of tort claims against it in the Federal Courts by the Federal Tort Claims

Act (28 U.S.C. §1346, 1402, 1584, 2110, 2401, 2402, 2411, 2412, 2671-2680). No distinction is made between tort claims and contract claims and both are allowed to be brought in the district court with no limit being placed on the amount that can be recovered by a person negligently injured by a federal employee acting within the scope of his employment and without denial of recovery for pain and suffering. The Federal Tort Claims Act has been in existence for nearly thirty (30) years and has evidently worked well.

Since there is, therefore, no compelling state interest that would allow an impairment of the rights granted by the Fourteenth Amendment to the United States Constitution then the application of the doctrine of sovereign immunity in Kentucky violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and sovereign immunity should thus be struck down under the Supremacy Clause of the United States Constitution.

B. THE CLASSIFICATION RESULTING FROM THE APPLICATION OF THE DOCTRINE OF SOVEREIGN IMMUNITY IN KENTUCKY DOES NOT MEET THE REQUIREMENT THAT IT BE REASONABLE, NOT ARBITRARY AND REST UPON SOME GROUND OF DIFFERENCE HAVING A FAIR AND SUBSTANTIAL RELATION TO THE OBJECT OF THE LAW.

Even if a fundamental right or suspect classification is not found to be involved, the classification resulting from the application of the doctrine of sovereign immunity in Kentucky would still be subject to the scrutiny of this Court. Although this scrutiny would fall within the realm of less than strictest scrutiny, this Court has emphasized that the scrutiny "is not a toothless one." *Trimble* v. *Gordon*, 430 U.S. 762, 768 (1977); *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976). In view of the statement by the Court of Appeals of Kentucky in the instant case that the protection of the fiscal integrity of the state is no longer a valid reason for the doctrine of sovereign immunity (Appendix C, page 16a), it is clear that the classification resulting from the application of the doctrine of sovereign immunity in Kentucky has no reasonable basis, it is arbitrary and it does not rest upon some ground of difference having a fair and substantial relation to the object of the law.

In *Trimble* v. *Gordon, supra,* this Court held that although illegitimacy is not a suspect

classification, the Illinois law which allowed legitimate children to inherit from both parents but only allowed illegitimate children to inherit from their mothers would not stand up under the Equal Protection Clause of the Fourteenth Amendment under the Court's scrutiny. It was held that the distinction could not be justified on the basis of the state's interest in promoting legitimate family relationships or the state's interest in establishing a method of property disposition through which proof of a lineal relationship was not readily ascertainable. The Court stated that the Equal Protection Clause requires "more than the mere incantation of a proper state purpose" and the law's constitutionality must depend "upon the character of the discrimination and its relation to legitimate legislative aims." *Id.* at 769.

In *Reed* v. *Reed*, 404 U.S. 71 (1971), this Court was faced with an Idaho statute that provided that as between persons equally qualified to administer estates, males must be preferred to females. Without finding that a classification based on sex is a "suspect" classification requiring strict scrutiny, the Court held the classification violative of equal protection by applying the test of whether the classification was reasonable and not arbitrary. The Idaho Supreme Court had concluded that the object of the law was to reduce the workload of probate courts by eliminating one area of controversy when

two or more persons sought to administer an estate and that the statute was not an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing.

This Court, on the other hand, even though recognizing that the objective of reducing the workload on probate courts is not without some legitimacy, found that:

> . . . to give mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . .

Reed, supra at 75.

In a variety of other cases in recent years, this Court has applied the test outlined in *Reed* and struck down the statutes involved as violative of equal protection. In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), this Court struck down a Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons for that purpose. In *James* v. *Strange*, 407 U.S. 128 (1972), this Court was faced with a Kansas statute which provided for the recoupment from indigent

defendants of legal defense fees expended on their behalf but the debtor in the recoupment action could not avail himself of a number of protective exemptions afforded to other civil judgment debtors. The Supreme Court held that although the protection of public funds through recoupment statutes might be a legitimate state interest, the unequal treatment afforded indigent criminal defendants as compared to other classes of debtors was lacking "some rationality" in the class singled out and was, therefore, a discrimination proscribed by the Equal Protection Clause.

The invidious discrimination practiced in the name of sovereign immunity in Kentucky becomes even clearer when it is pointed out that the doctrine of sovereign immunity has been arbitrarily held to apply to some classes of people who would bring suit against the Commonwealth and not to apply to others.

Where property rights are infringed by the Commonwealth, the Kentucky Court of Appeals has relied upon the overriding constitutional principles of the Kentucky Constitution prohibiting the taking of private property for public use without just compensation (§§13 and 242)[3] and by developing the legal fiction of an "implied promise to pay" has held

3. Sections 13 and 242 of the Kentucky Constitution are appended hereto as Appendix G.

the Commonwealth liable for such a taking of property whether the property is damaged willfully or negligently. *Curlin* v. *Ashby*, Ky., 264 S.W.2d 671 (1954); *Lehman* v. *Williams*, 301 Ky. 729, 193 S.W.2d 161 (1946). In *Lehman*, the Court of Appeals found that where private property is taken for public use, the state's immunity is waived through Sections 13 and 242 of the Constitution. On the other hand, where it is a matter of life or limb of a human being that has been taken or injured by the Commonwealth or its agents, the Court has allowed sovereign immunity to defeat claims against the Commonwealth and has disregarded the constitutional guarantees of the Kentucky and United States Constitutions.

In discussing this "preposterous anomaly" that has grown up in our law, Justice Palmore in his dissenting opinion in *Cullinan* v. *Jefferson County*, Ky., 418 S.W.2d 407 (1967), responded to a description of this anomaly as "shocking" by stating at page 411:

> The word "shocking" is well said. It is inexcusable. I rest my case on the proposition stated long ago by one of the greatest human beings of all time: "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." First Annual Message by Abraham Lincoln,

December 3, 1861, in "The State of the Union Messages of the President, 1790-1966," Vol. II, p. 1060 (ed. by F. T. Israel, 1966).

Another example of the invidious discrimination caused by sovereign immunity is the fact that by virtue of KRS 44.270 the defense of sovereign immunity has been abolished in contract cases against the Commonwealth and such suits can be brought in Franklin Circuit Court. Thus the wealthy businessman or the large company that enters into a contract with the Commonwealth can bring suit in circuit court against the Commonwealth if the contract is breached but the innocent victim that is run down on the street by a state employee is denied his right to bring suit against the Commonwealth except before the state-established Board of Claims with all the attendant restrictions and limitations.

In the case at bar, the denial to persons injured through the negligence of an agent of the Commonwealth of the right to bring suit against the Commonwealth is no less arbitrary than the arbitrary choice of male over female struck down in *Reed, supra,* or the arbitrary denial to indigent criminal defendants of rights afforded other debtors in *James, supra.* Allowing persons whose property is damaged by the Commonwealth, whether willfully or negligently, to bring suit and allowing persons to bring suit against the Commonwealth in contract

actions while denying the right to bring suit against the Commonwealth to those persons injured in an accident caused by a negligent agent of the Commonwealth is completely arbitrary and without rational basis. Furthermore, the denial to one classification of the right to bring suit against the Commonwealth while allowing all other classifications to bring such suits constitutes a discrimination between the classifications that bears no reasonable relation to the objective of the law of protecting the public funds. As long as some classes of people are allowed to bring suit against the Commonwealth and collect judgments that deplete the state treasury no other class should be denied that same right.

II. THE DOCTRINE OF SOVEREIGN IMMUNITY IN KENTUCKY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The doctrine of sovereign immunity in Kentucky, by forcing Appellant to file his claim with a state-appointed Board of Claims and denying him the right to seek redress against the Commonwealth of Kentucky through the court system for the full extent of the damages suffered, denies Appellant the due process of law guaranteed him by the Fourteenth Amendment to the United States Constitution. The question of access to the courts has not often been considered within the context of due process. Yet it seems that one of the essential

requirements of due process of law is access for victims of wrongfully inflicted injuries, to bring his cause of action through the usual court system with the right to a jury trial, the right to recover for pain and suffering and right to recover for the full extent of the injuries suffered without some arbitrary limitation on recovery.

This Court, in *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), dealt squarely with the issue of access to the courts as a due process requirement. In *Boddie,* an indigent, desiring to obtain a divorce, challenged a state statute which required payment of court filing and process fees as a condition precedent to gaining access to the divorce court. The Supreme Court held the statute to be violative of due process of law because it denied to indigents access to the only remedy available to obtain the kind of relief desired. In so holding, this Court stated that:

> . . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Id.* at 377.

The Court went on to say at page 378:

> . . . What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," (emphasis added), "for [a] hearing appropriate to the nature of the case. . . . (Citations omitted).

Although the application of the decision in *Boddie* was limited to the issue of an indigent seeking a divorce, the reasons for the decision would be just as applicable to the instant situation where an innocent victim of the negligence of a state employee is denied the right to seek redress through the courts of the Commonwealth to recover for the full extent of his damages and the right to a trial by jury. This becomes especially clear when it is recalled, as explained in the previous argument, that a property owner has clear access to the courts for a determination of the fairness of an offer when the state takes private property for its use or when the state negligently or willfully destroys private property but there is no corresponding right when the state wrongfully inflicts personal injury. There is no legal or logical reason to deny the same right to a victim of personal injury wrongfully inflicted by the state.

CONCLUSION

When the Commonwealth of Kentucky can, through the acts of its agents, and in violation of its express responsibilities to its citizens, inflict personal injury without being required to render compensation to the full extent of the injuries suffered and without

the victim being entitled to a trial in a regularly constituted trial court with a jury, the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment become meaningless. The Supreme Court of the State of Kentucky in this case has decided, by refusing to even hear, an important question of Constitutional law which has not been, in light of present-day circumstances, but should be, expressly settled by this Court. Although this case involves only three individuals and their damages, the constitutional question presented by this case is important to every citizen of the United States of America who may one day stand in the shoes of these petitioners. For these reasons, federal questions are presented by this appeal which are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

VARELLAS and VARELLAS

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266 West Main Street
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Attorney for Appellant

APPENDIX

APPENDIX A

FILED
SEP - 5 1975
JAMES E. COLLINS
Clerk Franklin Circuit Court

FRANKLIN CIRCUIT COURT

GARY GEORGE HUFFMAN,
Individually, As Administrator of the
Estate of Jane Todd Huffman,
Deceased, and as Next Friend of
Shannon Michele Huffman, An
Infant PLAINTIFF

VS. COMPLAINT NO. 86344

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS and
DEPARTMENT OF NATURAL
RESOURCES DEFENDANT

* * * * * * * *

COUNT I

Comes the Plaintiff, Gary George Huffman, individually, through counsel, and for Count I of his Complaint against the Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, states and alleges as follows:

1. That on or about September 9, 1974, while the Plaintiff's decedent was operating her automobile upon a state designed and maintained highway known as the Versailles Road in Fayette County, Kentucky, said decedent's automobile was struck head-on by another vehicle which crossed the dividing median of Versailles Road, and such was a substantial factor in causing the collision.

2. That a substantial factor in the causation of said collision was either the defective design, construction or maintenance or a combination of two or more of the aforementioned, of Versailles Road by the Commonwealth of Kentucky and but for said negligent design, construction or maintenance, the aforementioned collision would not have occurred.

3. That Charles Stephen Jones, the driver of the vehicle which crossed the median and collided with the Huffman vehicle was an agent, servant and/or employee of the Commonwealth of Kentucky, Department of Natural Resources and was acting within the scope of such at the time of the collision.

4. That as a result of injuries incurred by Jane Todd Huffman in the aforementioned collision, said Jane Todd Huffman, the lawful wife of Plaintiff, died on or about September 9, 1974.

5. That as a proximate result of Jane Todd Huffman's death which was caused by the gross negligence of the Defendant, Plaintiff, Gary George

Huffman, lost his right to the services, assistance, aid, society, companionship and his conjugal relationship with his wife, Jane Todd Huffman, all to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

6. That as a result of Defendant's negligence which was a substantial factor in the causation of the within accident, Plaintiff's automobile, a 1973 Volkswagen Beetle, was damaged to the effect that immediately before the accident Plaintiff's vehicle was worth approximately Two Thousand and Eight Hundred ($2,800.00) Dollars and immediately after the accident Plaintiff's vehicle was worth approximately One Hundred and Fifty ($150.00) Dollars, all to the Plaintiff's damage in the amount of Two Thousand and Six Hundred and Fifty ($2,650.00) Dollars.

7. That Defendant's grossly negligent design, construction or maintenance or a combination of two or more of the aforementioned, of Versailles Road which was a substantial factor in the causation of the hereinbefore referred to collision which resulted in Jane Todd Huffman's death, was done with a gross disregard for human life and safety and therefore Defendant, Commonwealth of Kentucky, should be punished for such and should be required to pay Plaintiff the sum of One Hundred Thousand ($100,000.00) Dollars as punitive damages for its negligence.

WHEREFORE, Plaintiff, Gary George Huffman, individually demands the following relief:

1. Judgment against the Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, either jointly or severally, in the amount of Two Hundred and Two Thousand and Six Hundred and Fifty ($202,650.00) Dollars with said Judgment to bear interest at the maximum legal rate of six (6%) per cent per annum from date of entry until paid;

2. His costs expended in bringing this action;

3. A Trial by Jury; and

4. Any and all other relief to which he may appear entitled.

COUNT II

Comes the Plaintiff, Gary George Huffman, as Administrator of the Estate of Jane Todd Huffman, deceased, and for Count II of his Complaint against the Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, states as follows:

1. That Plaintiff, Gary George Huffman, was appointed Administrator of the Estate of Jane Todd Huffman, deceased, by Order of the Woodford County Probate Court, Woodford County, Kentucky. Woodford County being the county of decedent's residence.

2. That the deceased, Jane Todd Huffman, at the time of her death, and the accident hereinafter described, was a citizen and resident of the State of Kentucky living and residing in Versailles, Woodford County, Kentucky.

3. That on or about September 9, 1974, while the Plaintiff's decedent was operating her automobile upon a state designed and maintained highway known as the Versailles Road in Fayette County, Kentucky, said decedent's automobile was struck head-on by another vehicle which crossed the dividing median of Versailles Road, and such was a substantial factor in causing the collision.

4. That a substantial factor in the causation of said collision was either the defective design, construction or maintenance or a combination of two or more of the aforementioned, of Versailles Road by the Commonwealth of Kentucky and but for said negligent design, construction or maintenance, the aforementioned collision would not have occurred.

5. That Charles Stephen Jones, the driver of the vehicle which crossed the median and collided with the Huffman vehicle was an agent, servant and/or employee of the Commonwealth of Kentucky, Department of Natural Resources and was acting within the scope of such at the time of the collision.

6. That as a result of injuries incurred by Jane Todd Huffman in the aforementioned collision, said

Jane Todd Huffman died on or about September 9, 1974.

7. Plaintiff states that as a result of the negligence of the Defendant, decedent was killed wrongfully and as a result the decedent's estate was damaged to the effect that decedent was but twenty-seven (27) years of age and her estate was denied her potential earning capacity of approximately Two Hundred and Sixty-six Thousand ($266,000.00) Dollars.

8. That because of Jane Todd Huffman's death, Plaintiff was caused to incur a funeral bill for the proper burial of decedent all to his damage as Administrator of the Estate of Jane Todd Huffman in the amount of approximately Two Thousand and Five Hundred ($2,500.00) Dollars.

9. That Defendant's grossly negligent design, construction and/or maintenance or a combination of two or more of the aforementioned, of Versailles Road was done with a gross disregard for human life and safety and therefore Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources should be punished for such and should be required to pay to Plaintiff the sum of One Hundred Thousand ($100,000.00) Dollars as punitive damages for its negligence which was a substantial factor in causing the within accident which resulted in the death of Jane Todd Huffman.

WHEREFORE, Plaintiff, Gary George Huffman, as Administrator of the Estate of Jane Todd Huffman, deceased, demands the following relief:

1. Judgment against the Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, either jointly or severally, in the amount of Three Hundred and Sixty-eight Thousand and Five Hundred ($368,500.00) Dollars with said Judgment to bear interest at the maximum legal rate of six (6%) per cent per annum from date of entry until paid;

2. His costs expended to bring this action;

3. A Trial by Jury; and

4. Any and all other relief to which he may appear entitled.

COUNT III

Comes the Plaintiff, Gary George Huffman, as Next Friend of Shannon Michele Huffman, an infant, and for Count III of his Complaint against the Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, states and alleges as follows:

1. That Plaintiff is the father of Shannon Michele Huffman, an infant, and that Shannon's mother, Jane Todd Huffman, was killed in the collision which is the subject of this controversy

which occurred on or about September 9, 1974. Plaintiff further states that he is a resident of the State of Kentucky; is over the age of majority and is under no legal disability as far as is known to him and he is not indebted to Shannon Michele Huffman as far as is known to him.

2. Than on or about September 9, 1974, Shannon Michele Huffman was a passenger in a vehicle being driven by her mother, Jane Todd Huffman, while said Jane Todd Huffman was operating her automobile upon a state designed and maintained highway known as the Versailles Road in Fayette County, Kentucky, when said automobile was struck head-on by another vehicle which crossed the dividing median of Versailles Road, and such was a substantial factor in causing the accident.

3. That a substantial factor in the causation of the collision was either the defective design, construction or maintenance or a combination of two or more of the aforementioned, of Versailles Road by the Commonwealth of Kentucky and but for said negligent design, construction or maintenance, the aforementioned collision would not have occurred.

4. That Charles Stephen Jones, the driver of the vehicle which crossed the median and collided with the Huffman vehicle was an agent, servant and/or employee of the Commonwealth of Kentucky, Department of Natural Resources and was acting within the scope of such at the time of the collision.

5. That as a result of the aforementioned collision, Shannon Michele Huffman, an infant, was severely and permanently injured and such has caused Plaintiff, Gary George Huffman, to incur medical bills for the treatment of Shannon's injuries in the amount of approximately Thirty Thousand ($30,000.00) Dollars to date, and he will likely incur additional medical bills for the treatment of Shannon's injuries in the approximate amount of Twenty-five Thousand ($25,000.00) Dollars in the future.

6. Plaintiff further avers that Shannon's power and ability to earn money in the future has been impaired as a result of the injuries she sustained in the accident which is the subject of this controversy all to her damage in the amount of One Hundred and Fifty Thousand ($150,000.00) Dollars.

7. That Defendant's grossly negligent design, construction and/or maintenance of Versailles Road was done with a gross disregard for human life and safety and therefore Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, should be punished for such and should be required to pay to Plaintiff the sum of One Hundred Thousand ($100,000.00) Dollars as punitive damages for its negligence which was a substantial factor in causing the within accident which resulted in severe and permanent injury to Shannon Michele Huffman.

8. That due to the serious physical injuries sustained in the accident which occurred on or about September 9, 1974, by Shannon Michele Huffman, Shannon has been caused to suffer extreme physical pain and mental anguish to date and she will likely suffer such in the future all to her damage in the amount of One Hundred and Fifty Thousand ($150,000.00) Dollars.

WHEREFORE, Plaintiff, Gary George Huffman, as Next Friend of Shannon Michele Huffman, an infant, demands the following relief:

1. Judgment against the Defendant, Commonwealth of Kentucky, Department of Highways and Department of Natural Resources, either jointly or severally, in the amount of Four Hundred and Fifty-five Thousand ($455,000.00) Dollars with said Judgment to bear interest at the maximum legal rate of six (6%) per cent per annum from date of entry until paid;

2. His costs expended in bringing this action;

3. A Trial by Jury; and

4. Any and all other relief to which he may appear entitled.

/s/ James J. Varellas
JAMES J. VARELLAS
ATTORNEY FOR PLAINTIFF
257 West Short Street
Lexington, Kentucky 40507
Telephone: (606) 252-4473

I have read the foregoing Complaint and the statements contained therein are true and correct to the best of my knowledge and belief and are made of my own free act and deed.

/s/ Gary George Huffman
GARY GEORGE HUFFMAN, PLAINTIFF,
Acting Individually, As Administrator of
the Estate of Jane Todd Huffman,
Deceased, and as Next Friend of Shannon
Michele Huffman, An Infant

The foregoing statement was subscribed and sworn to before me and in my presence by Gary George Huffman, Plaintiff, acting individually, as Administrator or the Estate of Jane Todd Huffman, deceased, and as Next Friend of Shannon Michele Huffman, an infant, and declared by him to be true and correct and of his free act and deed on this the 5th day of September, 1975.

My Commission expires: April 15, 1978

/s/ James J. Varellas
NOTARY PUBLIC, State at Large, Ky.

* * * * * * *

APPENDIX B

FILED
OCT 6- 1976
JAMES E. COLLINS
Clerk Franklin Circuit Court

FRANKLIN CIRCUIT COURT
Civil Action No. 86344

GARY GEORGE HUFFMAN,
Individually, As Administrator of the
Estate of Jane Todd Huffman,
Deceased, and as Next Friend of
Shannon Michele Huffman, An
Infant PLAINTIFFS

VS. ORDER

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS AND
DEPARTMENT OF NATURAL
RESOURCES DEFENDANTS

****

Under authority of Kentucky Constitution Section 231 the Legislature has established a Board of Claims to hear cases involving negligence of the Commonwealth, its departments and agents (KRS 44.070). That statute has made the jurisdiction of the Board of Claims exclusive. This Court lacks jurisdiction.

We are asked to strike down the doctrine of sovereign immunity as well as the Board of Claims Act as being archaic and indefensible violations of the Kentucky Constitution, esp. the Bill of Rights, and the Fourteenth Amendment to the Constitution of the United States. These questions have been approached and fully answered in *University of Kentucky* vs. *Guinn*, Ky., 372 S.W. 2d 414 (1963) and in *Smith* vs. *Commonwealth, Department of Highways*, Ky., 495 S.W. 2d 179 (1973) wherein it was said:

> "Conceding that the doctrine of sovereign immunity is not above reproach, in view of *Foley Construction Company* vs. *Ward*, Ky., 375 S.W. 2d 392 (1964), it would appear that the appropriate forum for pursuing the fight against it is the General Assembly".

This Court has neither the authority nor the temerity to overrule a decision of the supreme Court of the Commonwealth.

It is therefore Ordered that the motion to dismiss plaintiffs' complaint be and is hereby sustained and the complaint is hereby dismissed.

This, the 6th day of October, 1976.

/s/ Squire N. Williams, Jr.
JUDGE, FRANKLIN CIRCUIT COURT
DIVISION TWO

* * * * * * * *

APPENDIX C

OPINION RENDERED: August 5, 1977
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

NO. CA-690-MR

GARY GEORGE HUFFMAN,
Individually, as Administrator of the
estate of Jane Todd Huffman,
deceased, and as Next Friend of
Shannon Michele Huffman, an
infant — APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT, DIVISION TWO
HONORABLE SQUIRE N. WILLIAMS, JR.,
JUDGE
CIVIL ACTION NO. 86344

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF HIGHWAYS and
DEPARTMENT OF NATURAL
RESOURCES — APPELLEES

AFFIRMING

****

BEFORE: WHITE, HOGGE, AND LESTER, JUDGES.

WHITE, JUDGE. The constitutionality of the doctrine of sovereign immunity is challenged on this appeal.

It appears from the verified complaint filed by appellant that on September 9, 1974, Jane Todd Huffman was driving on Versailles Road in Fayette County, Kentucky. Her daughter, Shannon Michele Huffman, was a passenger in the vehicle. A car driven by Charles Stephen Jones allegedly crossed the median and collided head-on with the Huffman vehicle, killing Mrs. Huffman and severely injuring her daughter. Allegedly, the daughter is permanently injured and here medical bills alone total $30,000.00.

The appellant further states that Mr. Jones was employed by the Kentucky Department of Natural Resources and was acting within the scope of his employment at the time of the accident. The appellant alleges that the injuries were due to the negligence of Mr. Jones and to the negligent highway design, and he asks for damages in excess of the type and amount authorized under KRS 44.070.

The appellees moved to dismiss on the basis of sovereign immunity. The trial court held that it lacks jurisdiction of this action under KRS 44.070(5). In considering the arguments of appellant that sovereign immunity is archaic and a violation of the Bill of Rights of the Kentucky Constitution and

of the fourteenth amendment of the Constitution of the United States, the court stated that it ". . . has neither the authority nor the temerity to overrule a decision of the supreme Court of the Commonwealth." The appellant's complaint was dismissed.

On appeal to this court, the appellant contends that sovereign immunity is a judicially created doctrine which has outlived its usefulness and now should be abolished. If we were starting with a *tabula rasa,* this would be a tempting choice. Regardless of the validity this doctrine once had, it is clearly now a shabby robe when worn by a modern constitutional state. Even the time-worn and honored argument that sovereign immunity is necessary to protect public funds which have been appropriated for specific purposes, see J. Dietzman in *Taylor* v. *Westerfield,* 233 Ky. 619, 26 S.W.2d 557, 69 *A.L.R.* 483 (1930), no longer has validity in an era when governments tax and spend vast amounts greatly in excess of anything our forefathers could have imagined. Not only has the financial capacity of government increased, but its ability to cause damage has multiplied, as is evidenced by the allegations in this case.

Unfortunately, this is not a case of first impression. The doctrine of sovereign immunity, though judicially created, has been set into the constitutional concrete four times in this commonwealth. Every constititution of the common-

wealth has had a provision similar to Section 231 of our present constitution, which reads as follows: "§ 231. Suits against the commonwealth. The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

In *Foley Construction Company* v. *Ward,* Ky., 375 S.W.2d 392 (1964), the Court of Appeals of Kentucky held that this constitutional acknowledgment of sovereign immunity directed that it was up to the General Assembly to abolish, alter, or modify sovereign immunity in any fashion it desired. See also *Smith* v. *Commonwealth, Department of Highways,* Ky., 495 S.W.2d 178 (1973). This same principle has been recently upheld in *George M. Eady Company* v. *Jefferson County,* Ky., 551 S.W.2d 571 (1977). We are, therefore, bound to uphold the doctrine of sovereign immunity in the present case.

Likewise, we are bound by the authority of *Wood* v. *Board of Education of Danville,* Ky., 412 S.W.2d 877 (1967), to uphold sovereign immunity in the face of an attack that it is unconstitutional under the Bill of Rights of the Constitution of Kentucky, specifically Sections 2, 4, 7, 14, and 26.

Appellant contends that sovereign immunity is violative of the equal protection and due process clauses of the fourteenth amendment of the United

States Constitution. Other jurisdictions which have recently faced this contention have divided, due in part to different factual situations. See. e.g., *Brown* v. *Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1974) (held violative); *Brown* v. *Commonwealth*, 305 A.2d 868 (Pa. 1973) (held not violative). Though the reasoning in *Brown* v. *Wichita State University*, *supra*, and the dissents in *Brown* v. *Commonwealth*, *supra*, are highly persuasive, we are not bound by them. We uphold sovereign immunity as not violative of equal protection and due process.

The appellant further contends that the establishment of the Board of Claims as an exclusive remedy is violative of various constitutional provisions, both of the Kentucky and United States Constitutions. We reject this contention, for the clear language of § 231 provides that: "[t]he General Assembly may, by law, direct *in what manner* and *in what courts* suit may be brought against the Commonwealth." (emphasis added). The General Assembly has enacted KRS 44.070(5) (Supp. 1976), which provides: "Regardless of any provision of law to the contrary, the jurisdiction of the board is exclusive, and a single claim for the recovery of money or a single award of money shall not exceed twenty thousand dollars ($20,000), exclusive of interest and costs."

The judgment is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT

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Varellas and Varellas
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Attorney for Department for Natural Resources

* * * * * * *

APPENDIX D

SUPREME COURT OF KENTUCKY
SC-444-D
(CA-690-MR)

GARY GEORGE HUFFMAN MOVANT

v. FRANKLIN CIRCUIT COURT
No. 86344

COMMONWEALTH OF KENTUCKY
ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion of Gary George Huffman for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED December 7, 1977.

/s/ John S. Palmore
Chief Justice

* * * * * * *

APPENDIX E

COMMONWEALTH OF KENTUCKY

Court of Appeals

MANDATE

GARY GEORGE HUFFMAN, INDIV., ETC.,
ET AL

VS.

File No. CA-690-MR
Opinion Rendered AUGUST 5, 1977

Appeal From FRANKLIN

Circuit Court Action No. 86344

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS AND NATURAL
RESOURCES

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

DECEMBER 7, 1977 - Movant's motion for Discretionary Review denied by the Supreme Court.

A Copy - Attest:
(seal)

Issued DECEMBER 9, 1977

/s/ John C. Scott
JOHN C. SCOTT, CLERK

* * * * * * * *

APPENDIX F

FRANKLIN CIRCUIT COURT

GARY GEORGE HUFFMAN,
Individually, As Administrator of the
Estate of Jane Todd Huffman,
Deceased, and as Next Friend of
Shannon Michele Huffman, An
Infant APPELLANTS

VS. NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES NO. 86344

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS and
DEPARTMENT OF NATURAL
RESOURCES APPELLEES

* * * * * * * *

I. Notice is hereby given that Gary George Huffman, individually, as Administrator of the Estate of Jane Todd Huffman, deceased, and as Next Friend of Shannon Michele Huffman, an infant, the Appellants above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Kentucky affirming by mandate issued December 9, 1977 the judgment of the Franklin Circuit Court upholding the validity of a state constitutional provision,

to-wit: Kentucky Constitution §231, the validity of such constitutional provision having been drawn into question as being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America and such judgment here appealed from being in favor of validity.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The Clerk will be notified at a later date as to what portion of the record of this cause should be prepared for transmission to the Clerk of the Supreme Court of the United States.

III. The following question is presented by this appeal:

Does §231 of the Kentucky Constitution, which has been interpreted by the Kentucky Courts as granting sovereign immunity to the Commonwealth of Kentucky, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

VARELLAS and VARELLAS

/s/ James J. Varellas
JAMES J. VARELLAS
ATTORNEY FOR APPELLANTS
Suite 300, Court Plaza
266 West Main Street
Lexington, Kentucky 40507
Telephone: (606) 252-4473

PROOF OF SERVICE

I, James J. Varellas, Attorney of Record for Gary George Huffman, individually, as Administrator of the Estate of Jane Todd Huffman, deceased, and as Next Friend of Shannon Michele Huffman, an infant, Appellants herein, depose and say that on the 17th day of February, 1978, I served the foregoing, Notice of Appeal to the Supreme Court of the United States, on the Appellees by depositing same in a United States mail box, with first class postage prepaid, address to their Attorneys of Record: namely, Hon. Jean A. McMillen, Department of Transportation, Bureau of Highways, P. O. Box 21178, Louisville, Kentucky 40221, Attorney for Department of Highways, and to Hon. George L. Seay, Jr., Office of General Counsel, Department for Natural Resources and Environmental Protection, 5th Floor - Capitol Plaza Tower,

Frankfort, Kentucky 40601, Attorney for Department for Natural Resources.

/s/ James J. Varellas
JAMES J. VARELLAS
ATTORNEY FOR APPELLANTS

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

I hereby certify that the foregoing, Proof of Service, was subscribed and sworn to before me and in my presence by James J. Varellas, Attorney for Appellants, and declared by him to be true and correct to the best of his knowledge and belief and of his free act and deed on this the 17th day of February, 1978.

My Commission expires: August 1, 1980

/s/ Cherie L. Elam
NOTARY PUBLIC, State at Large, Ky.

FILED: February 17, 1978

* * * * * * * *

APPENDIX G

THE KENTUCKY CONSTITUTION

SECTION 13

Double Jeopardy - Property not to be taken for public use without compensation.- No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

SECTION 242

Just compensation to be made in condemning private property - Right of appeal - Jury trial.- Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law.

* * * * * * * *

CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of March, 1978 three copies of the foregoing Jurisdictional Statement were mailed, postage prepaid, addressed to the Attorneys of Record for the Appellees; namely: Hon. Jean A. McMillen, Department of Transportation, Bureau of Highways, P.O. Box 21178, Louisville, Kentucky 40221, Attorney for the Department of Highways, and to Hon. George L. Seay, Jr., Office of General Counsel, Department for Natural Resources and Environmental Protection, 5th Floor - Capitol Plaza Tower, Frankfort, Kentucky 40601, Attorney for the Department for Natural Resources. I further certify that all the parties required to be served have been served.

James J. Varellas

JAMES J. VARELLAS
Attorney for Appellants

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1229

GARY GEORGE HUFFMAN, Individually, As Administrator of the Estate of Jane Todd Huffman, Deceased, and As Next Friend of Shannon Michele Huffman, An Infant - **Appellant**

versus

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS and DEPARTMENT OF NATURAL RESOURCES - **Appellees**

On Appeal from the Court of Appeals of Kentucky

MOTION TO DISMISS OR AFFIRM

ROBERT F. STEPHENS
Attorney General

VICTOR FOX
DAVID M. WHALIN
Assistant Attorneys General

State Capitol Building
Frankfort, Kentucky 40601
Counsel for Appellees

Of Counsel:

For the Department of Transportation:

ED W. HANCOCK
PAUL HUNDLEY
WILLIAM WALLACE

For the Department of Natural Resources:

HUGH ARCHER
VALERIE FRAVEL
ALAN HARRINGTON
Frankfort, Kentucky 40601

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1229

GARY GEORGE HUFFMAN, Individually, As Administrator of the Estate of Jane Todd Huffman, Deceased, and As Next Friend of Shannon Michele Huffman, An Infant - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS and DEPARTMENT OF NATURAL RESOURCES - *Appellees*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Kentucky on the ground that it is manifest that the issues on which the decision of the case depends do not present substantial federal questions.

JURISDICTION

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2), to which appellees object because appellant's rights to equal protection and due process under the Constitution of the United States

are not violated by the application of the doctrine of sovereign immunity as embodied by § 231 of the Kentucky Constitution.

STATUTORY PROVISIONS INVOLVED

§ 231 of the Kentucky Constitution reads:

> "The general assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."

QUESTIONS PRESENTED

I. **Whether or Not the Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Violative of the Equal Protection Clause of the United States Constitution?**

II. **Whether or Not the Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Violative of the Due Process Provisions of the United States Constitution?**

STATEMENT OF THE CASE

Appellant filed suit in Franklin Circuit Court against the Commonwealth of Kentucky (Appellant's Appendix A). The Commonwealth's motion to dismiss, pursuant to § 231 of the Kentucky Constitution, was granted (Appellant's Appendix B) and he appealed to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky upheld the dismissal (Appellant's Appendix C), and discretionary review was denied by the Supreme Court of Kentucky (Appellant's Appendix D).

ARGUMENT

I. The Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Not Violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Contrary to what is urged by appellant, it has been well settled since the case of *Palmer* v. *Ohio,* 248 U. S. 32 (1918) that the question of state governmental immunity is not one for review by this Court. The argument that the doctrine of sovereign immunity violates the equal protection clause of the Fourteenth Amendment has been rejected by each Court confronted with the argument. This Court has on at least three recent occasions dismissed appeals involving this issue. *Krause* v. *State,* 28 Ohio App. 2d 1, 274 N. E. 2d 321 (1971), reversed 31 Ohio St. 2d 132, 285 N. E. 2d 736 (1972), appeal dismissed sub nom. *Krause* v. *Ohio,* 409 U. S. 1052, 34 L. Ed. 2d 506, 93 S. Ct. 557 (1972), reh. denied 410 U. S. 918, 35 L. Ed. 2d 280, 93 S. Ct. 959 (1973); *Berry* v. *Hinds County, Mississippi,* 344 So. 2d 146 (Miss. 1977), cert. denied —— U. S. ——, 98 S. Ct. 114, 54 L. Ed. 2d 91 (1977); *Brown* v. *Wichita State University,* 217 Kan. 661, 538 P. 2d 713 (1975), reversed en banc on motion for rehearing 219 Kan. 2, 547 P. 2d 1015 (1976), appeal dismissed sub nom. *Bruce* v. *Wichita State University,* 429 U. S. 806, 97 S. Ct. 41, 50 L. Ed. 2d 67 (1976).

Numerous state court decisions have considered and rejected the equal protection argument. Representative cases include:

In *Swafford* v. *City of Garland,* 491 S. W. 2d 175 (Tex. Civ. App. 1973) Swafford sued the City in tort found on malicious prosecution. The trial court granted the City's motion for summary judgment based on the doctrine of sovereign immunity. The Texas Court of Civil Appeals affirmed stating:

> "We find no merit in his [Swafford's] contention that the application of the doctrine of sovereign immunity in this case is offensive to the equal protection and due process clauses of the State and Federal Constitutions. . . ." 491 S. W. 2d at 176.

In *Sousa* v. *State,* 341 A. 2d 282 (N.H. 1975) Sousa and Evans sued for injuries they sustained when the State-owned-and-maintained bridge over which they were driving collapsed. The State filed motions to dismiss on the ground of sovereign immunity. The motions were granted. On appeal the New Hampshire Supreme Court rejected the plaintiffs' constitutional arguments stating:

> ". . . Nor does it constitute a violation of plaintiffs' rights to equal protection as all those who are similarly situated are similarly treated. . . . In short, we hold that there is no constitutional provision which confers on the plaintiffs a right to sue and hold the State liable for a tort. . . ." 341 A. 2d at 285.

In *Hall* v. *Powers,* 6 Pa. Cmwlth. 544, 296 A. 2d 535 (1972), aff'd 311 A. 2d 612 (Pa. 1973), wherein a complaint in trespass had been filed against the Commonwealth and a Commonwealth employee, the Commonwealth Court of Pennsylvania stated:

> "The plaintiff . . . has raised the issue here that Pennsylvania's doctrine of sovereign immunity constitutes a denial of equal protection and due process under the United States Constitution by creating two classes of litigants: those who have a cause of action because injured by a private tortfeasor, and those whose cause of action is barred by sovereign immunity. In Duquesne, supra [Duquesne Light Co. v. Dept. of Transportation, Pa. Cmwlth., 295 A. 2d 351 (filed Oct. 2, 1972)], however, this Court specifically rejected that contention." 296 A. 2d at 536.

The Court sustained the Commonwealth's preliminary objections and dismissed plaintiff's complaint. The Supreme Court of Pennsylvania [311 A. 2d 612] affirmed the order of the lower court.

In *Knapp* v. *City of Dearborn,* 60 Mich. App. 18, 230 N. W. 2d 293 (1975), a tort action against a city, the plaintiff contended among other things that the Michigan governmental immunity statute was unconstitutional because "its application unreasonably burdens free access to the courts" and "it creates an arbitrary distinction between tortfeasors and injured persons." 230 N. W. 2d at 294. The Michigan court rejected the plaintiff's constitutional argument.

Crowder v. *Department of State Parks,* 228 Ga. 436, 185 S. E. 2d 908 (1971), cert. denied sub nom. *Crowder* v. *Georgia,* 406 U. S. 914 (1972) was an action on behalf of a minor injured by a fall in a state park.

The defendants—the State of Georgia, the Department of State Parks of Georgia, its Director, and the Superintendent of Cloudland Canyon State Park—interposed the defense that the amended complaint failed to state a claim upon which relief could be granted and sovereign immunity. The trial court dismissed the action stating "there is no statute authorizing the suit against the State or its Department of State Parks and for this reason the case is dismissed. . . ." 185 S. E. 2d at 910. The Court of Appeals affirmed the trial court. The Supreme Court of Georgia granted the plaintiff's application for certiorari and in a decision affirming the judgment of the lower court held that the abrogation of the doctrine of sovereign immunity was a matter of public policy for action by the legislature, not the judiciary. As to the equal protection and due process arguments made by the plaintiff, the Georgia Supreme Court stated: "It [the doctrine of sovereign immunity] does not, we unhesitatingly hold, violate either the State or Federal Constitution." 185 S. E. 2d at 911. See also *Azizi* v. *Bd. of Regents of the Uni. System of Ga.*, 132 Ga. App. 384, 208 S. E. 2d 153 (1974), aff'd 233 Ga. 487, 212 S. E. 2d 627 (1975).

This Court in *Palmer, supra,* in rejecting the contention, stated:

> "The rights of individuals to sue a state, in either a Federal or a state court, cannot be derived from the Constitution or laws of the United States. It can only come from the consent of the state." 248 U. S. at 34.

In *Reed* v. *Reed,* 404 U. S. 71 (1971), wherein the equal protection clause was under discussion, the court stated:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . ." 404 U. S. at 75.

The Court also stated in *Tigner* v. *Texas,* 310 U. S. 141 (1940):

> ". . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. . . ." 310 U. S. at 147.

16 Am. Jur. 2d Constitutional Law, section 533 (1964) reads:

> "It is a general rule that equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions.
>
> "Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts."

§ 231 is not, on its face, discriminatory for it creates no classification. Without enabling legislation it is an absolute bar to all suits against the Commonwealth. With regard to the enabling legislation, all persons similarly situated are treated similarly. Any claim against the Commonwealth must be made in the Board of Claims,[1] which is open to the claimant on the same conditions as to others in like circumstances and where the same rules of evidence and modes of procedures are available to those similarly situated. Persons who seek recovery for the alleged negligence of a state employee are entitled to seek recovery against the employee individually in court and are not compelled to prosecute their claim before the Board of Claims.

The purpose of the enabling legislation creating the Board of Claims was not to grant a cloak of immunity behind which all employees of the Commonwealth could hide from their individual responsibility for their alleged negligent acts, but was to partially waive im-

[1]KRS 44.070(1):

"A board of claims, composed of the members of the crime victims compensation board as hereinafter provided, is created and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its departments or agencies, or any of its officers, agents or employes while acting within the scope of their employment by the Commonwealth or any of its departments or agencies; provided, however, regardless of any provision of law to the contrary, the Commonwealth, its departments and agencies, and its officers, agents and employes, while acting within the scope of their employment by the Commonwealth or any of its departments or agencies, shall not be liable for pain or suffering, and compensation shall not be allowed, awarded, or paid for pain or suffering. Except as herein provided the board shall be independent of all agencies and departments of the Commonwealth except as provided in KRS 44.070 to 44.160."

munity by reason of sovereignty and to facilitate the processing of claims against the state.

Furthermore, persons who seek recovery in negligence against private tort-feasors are different from those who seek recovery for negligence against the Commonwealth. They are not similarly situated and may be treated differently. Appellant is not denied the opportunity to seek recovery because of race or sex or financial status. The legislation does not single out any discrete and insular minority or any group defined by immutable characteristics. All persons who seek recovery in negligence from the Commonwealth are, without regard to any classification, treated the same.

Appellant attempts to create a classification by pointing to the remedy available by those who enter into contracts with the Commonwealth.[2] These persons are differently situated with different causes of actions. Their recovery is limited to the amount of the contract previously and voluntarily entered into by both the Commonwealth and the person.

Clearly, as shown above, the doctrine of sovereign immunity as embodied in § 231 of the Kentucky Con-

[2]KRS 44.270:

"(1) Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

(2) If damages awarded on any contract claim under this section exceed the original amount of the contract, such excess shall be limited to an amount which is equal to the amount of the original contract."

stitution is not violative of the equal protection clause of the United States Constitution and the appeal should be dismissed.

II. The Doctrine of Sovereign Immunity, as Embodied in § 231 of the Kentucky Constitution, Is Not Violative of the Due Process Provisions of the United States Constitution.

Many of the cases cited under Point I considered the question of whether or not the doctrine of sovereign immunity is offensive to the due process clauses of the United States Constitution. Each case held such immunity was not violative of due process. *Swafford* v. *City of Garland, supra; Hall* v. *Powers, supra;* and *Crowder* v. *Department of State Parks, supra.* See also *Snow* v. *Freeman,* 55 Mich. App. 84, 222 N. W. 2d 43 (1974). The due process question was specifically raised before the United States Supreme Court in *Palmer* v. *Ohio, supra,* which involved sovereign immunity, and the Court specifically held that the case raised no federal question.

In its opinion on the motion for rehearing in *Brown* v. *Wichita State University, supra,* the Kansas Supreme Court addressed itself to the question of whether constitutional due process was violated by K.S.A. 46-901, et seq., the Kansas statute that established governmental immunity. The Court held that K.S.A. 46-901, et seq., violated no provisions of the United States Constitution. The Court stated:

> "The court has been cited to no case where constitutional due process has been used as a basis for the abrogation of legislatively imposed governmental immunity." 547 P. 2d at 1031.

To support their argument, appellant cites *Boddie* v. *Connecticut,* 401 U. S. 371 (1971). The ruling in *Boddie* is limited as the Court said:

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U. S. at 382-383.

This position was reemphasized in *United States* v. *Kras,* 409 U. S. 434 (1973). Kras contended as does appellant that his case fell squarely within *Boddie.* In rejecting this, the Court relied on the above statement in *Boddie.* 409 U. S. at 450. Appellee submits that *Boddie* does not support the proposition that constitutional due process may be used as a basis for the abrogation of sovereign immunity.

No denial of due process exists as a result of a partial waiver of sovereign immunity. As Mr. Justice Brandeis stated long ago in *Tutun* v. *United States,* 270 U. S. 568 (1925):

> "The United States may create rights in individuals against itself, and provide only an administrative remedy. (citation omitted) It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. (citations omitted) It may give to the individual the option of either an administrative or a legal remedy. (citations omitted) Or it may provide only a legal remedy. (citation omitted)" 270 U. S. at 576-577.

Also, in *McElrath* v. *United States,* 102 U. S. 426 (1880):

> "The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and rules of practice to be observed in such suits. It may restrict the jurisdiction of the Court to a consideration of only certain classes of claims against the United States." 102 U. S. at 440.

Kentucky's partial waiver of sovereign immunity is an expansion of individual rights.[3] It is the conferring of an economic benefit by the people of Kentucky upon those who have a moral claim against the people. The conferment, however, is not sufficient to create the right in appellant to bring the action he sought to bring.

[3]Kentucky provides far greater procedural safeguards in the administrative setting than are required by the Fourteenth Amendment as are articulated by *Withrow* v. *Larkin,* 421 U. S. 35 (1975). See, *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning and Zoning Commission,* 379 S. W. 2d 450 (Ky. 1964); *Gentry* v. *Ressnier,* 437 S. W. 2d 756 (Ky. 1969); *City of Louisville* v. *McDonald's,* 470 S. W. 2d 173 (Ky. 1971); and *City of Northfield* v. *Holiday Manor, Inc.,* 479 S. W. 2d 596 (Ky. 1972).

§ 231 of the Kentucky Constitution is not, on its face, violative of due process of law for it neither mandates procedure or the taking of life, liberty or a vested property right. Nor do the legislative enactments under its authority act to deny due process of law.

CONCLUSION

The appellees respectfully submit that the questions presented raise no federal constitutional right and are so unsubstantial as not to need further argument; and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victor Fox, one of counsel for appellees, hereby certify that the foregoing Motion to Dismiss or Affirm was served on appellant by depositing three copies of same in the United States mail, first class postage prepaid, on March 31, 1978, addressed to counsel for appellant, Hon. James J. Varellas, Varellas and Varellas, Suite 300, Court Plaza, 266 West Main Street, Lexington, Kentucky 40507.

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